

# Enhancing taxpayers' rights in New Zealand – an opportunity missed?

Adrian Sawyer\*

## *Abstract*

This article assesses what the author believes to be a major missed opportunity by the New Zealand government and Inland Revenue to enhance the position of taxpayers' rights in New Zealand following the 2017-19 Tax Working Group's review of the New Zealand tax system. The Tax Working Group's recommendations did not support prior recommendations in an important position paper provided to the Tax Working Group's Secretariat advocating for a dedicated tax ombudsman and the establishment of a taxpayer advocate service (like that in the United States). In addition, there was no support for developing a formal taxpayers' bill of rights. The New Zealand government determined it would only consider the recommendation for a truncated tax disputes process to be added to the Tax Policy Work Programme. Notwithstanding New Zealand's external appearance as a country that protects its citizens and taxpayers, when it comes to taxpayers' rights, a very uneven playing field in favour of Inland Revenue remains. In the author's view, New Zealand missed a golden opportunity to enhance taxpayers' rights and move towards levelling the playing field.

**Key words:** New Zealand, Tax Working Group, taxpayers' rights, uneven playing field

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\* Professor of Taxation, UC Business School at the University of Canterbury, Christchurch NZ. Email: [adrian.sawyer@canterbury.ac.nz](mailto:adrian.sawyer@canterbury.ac.nz). I would like to thank Andrew Maples for his valuable comments on an earlier draft of this article. I would also like to thank the two anonymous reviewers who provided valuable comments and recommendations which have improved the article. The views expressed and any errors remain those of the author.

## 1. INTRODUCTION

The tension between protection of the integrity of the tax system to ensure robust flows of tax revenue and the protection of the rights of individual taxpayers continues to raise its head both when reviews of the tax system arise and when reports emerge of taxpayers being 'burnt off' during a dispute with the tax authority. This tension was highlighted recently in New Zealand with the 2017-19 review of the tax system.

The New Zealand Tax Working Group (TWG) was established in late 2017 by the Labour-led coalition government as one of its election campaign promises to explore further improvements in the structure, fairness and balance of the New Zealand tax system. The TWG was provided with terms of reference that directed its review from its establishment to provision of its final report in February 2019.<sup>1</sup>

In a background paper prepared for the TWG's Secretariat,<sup>2</sup> several key recommendations were made, namely to:

1. establish a Deputy Ombudsman with sole responsibility for oversight of complaints involving Inland Revenue (IR);
2. simplify the current disputes process to reduce costs by allowing earlier use of IR's Dispute Resolution Unit; and
3. establish a Taxpayer Advocate Service (TAS) like that within the United States Internal Revenue Service (IRS).

Adoption of the Australian Taxation Office's Dispute Assist programme, along with consideration of developing the current IR Charter into a formal taxpayers' Bill of Rights, like that available through the US Taxpayer Bill of Rights Act 2015 (TBOR), were also recommended.

In its Final Report,<sup>3</sup> the TWG recommended:

1. allocating additional resources should the level of complaints against IR require this;
2. establishing a taxpayer advocacy service to assist with the resolution of tax disputes; and

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<sup>1</sup> See further Hon Grant Robertson (Minister of Finance), 'Terms of Reference: Tax Working Group' (23 November 2017), <https://taxworkinggroup.govt.nz/resources/terms-reference-tax-working-group.html>.

<sup>2</sup> Third Party for the Tax Working Group, *Report on the Suitability of Establishing a Tax Ombudsman and a Tax Advocate: Third Party Report* (13 July 2018; released 20 September 2018), available at: <https://taxworkinggroup.govt.nz/resources/twg-bg-3985459-report-on-the-suitability-of-establishing-a-tax-ombudsman-and-a-tax-advocate->. The Secretariat commissioned a number of independent experts (individuals and groups) to prepare reports on specific subject matter. These reports would be presented to the TWG members for their consideration. The advice provided in this particular report represents the views of the group who prepared the report and does not necessarily represent the views of the TWG or the New Zealand government. The identity of the report writer has not been publicly disclosed. Furthermore, the US Taxpayer Advocate Service is set out in the US Internal Revenue Code, 26 USC 7803(c) and 7811(IRC 7803(c) and 7811).

<sup>3</sup> Tax Working Group (Hon Michael Cullen, chair), *Future of Tax: Final Report* (February 2019), Vol I – Recommendations, <https://taxworkinggroup.govt.nz/resources/future-tax-final-report>.

### 3. considering a truncated tax disputes process for small taxpayers.

The New Zealand government's response<sup>4</sup> was to consider including a truncated disputes process for small taxpayers on the Tax Policy Work Programme (TPWP).

The TWG and the New Zealand government's decisions to virtually set aside further exploration of the recommendations in the background paper provided to the TWG Secretariat is a significant lost opportunity for New Zealand taxpayers' rights to be formally recognised more closely to the extent that they are recognised in many other comparable jurisdictions. Prior research indicates that New Zealand taxpayers have few 'real' rights that are legally recognised and enforceable, made worse through the operation of an extremely uneven playing field tilted in favour of IR.<sup>5</sup> Furthermore, digitalisation of tax administration is exacerbating the situation for many taxpayers, especially those that are 'digitally challenged'.<sup>6</sup> Bentley identifies the challenges in concluding:<sup>7</sup>

*Digital transformation promises changes that will prove challenging for taxpayers, but the benefits are significant. Fortunately, the timeless principles of taxpayer protection and existing rights frameworks adapt seamlessly to digital disruption. There is an urgent need, however, to consider how the principles will apply to prevent the development of unnecessary gaps in taxpayer protection. It demands consideration of legal, ethical and moral issues, with proposed solutions based firmly in evidence and research.*

Clearly the risk of greater erosion of taxpayers' rights is real and action is needed to ensure there is no further erosion, and indeed to produce some improvement.

In order to uphold what is in the author's view a (mis)conception that New Zealand is a world leader in protection of taxpayers' rights, this article argues in support of the recommendations made to the TWG in the background paper, emphasising how a move down this path will benefit not only taxpayers but also IR and increase overall confidence in the New Zealand tax system. The New Zealand government and IR's 'fixation' on the integrity of the *tax system*, at the expense of individual taxpayers having to endure sacrifices for the greater good, is completely unacceptable in the author's view. Nevertheless, it is understandable given the obligations imposed on the Commissioner of Inland Revenue (Commissioner) in the *Tax Administration Act 1994* (TAA). The work of the TAS in the US has been instrumental in restoring some of the imbalance for vulnerable taxpayers with respect to their rights. The missed opportunities by the TWG and the New Zealand government to redress the imbalance of taxpayers' rights should not be permitted to remain. This article seeks to make the case why the

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<sup>4</sup> Hon Grant Robertson (Minister of Finance) and Hon Stuart Nash (Minister of Revenue), 'Government Responds to TWG Recommendations' (17 April 2019), <http://taxpolicy.ird.govt.nz/news/2019-04-17-government-responds-twg-recommendations>.

<sup>5</sup> Denham Martin, 'Honest Taxpayers Need Advocates and Real Rights' (2013) 212 *NZ Lawyer* (12 July) 22.

<sup>6</sup> Adrian Sawyer, 'The Impact of Digital Delivery on Taxpayer Assistance – A New Zealand Perspective' (Paper presented at the Fourth International Conference on Taxpayers' Rights, University of Minnesota Law School, Minneapolis, 23-24 May 2019).

<sup>7</sup> Duncan Bentley, 'Timeless Principles of Taxpayer Protection: How They Adapt to Digital Disruption' (2019) 16(3) *eJournal of Tax Research* 679, 713 (emphasis added). See also Duncan Bentley, 'Taxpayer Rights and Protections in a Digital Global Environment' in Robert F van Brederode (ed), *Ethics and Taxation* (Springer, 2020) 251.

New Zealand government and IR need to revisit the current imbalance in favour of the revenue with respect to taxpayers' rights, drawing in part upon international experience, especially that of the United States, as well as prior New Zealand experience.

The perspective taken in this article is largely positivist, in that it reviews the impact (or more importantly lack of impact) of a significant opportunity to redress the imbalance of taxpayers' rights in New Zealand. Normative suggestions are also offered in interpreting this lost opportunity.

The article adopts an in-depth exploratory case study approach, whereby it examines the activities of the TWG with respect to taxpayers' rights directly. It is common to see criticism of case studies as a research method, with some viewing the method to be a non-scientific approach to undertaking research. Notwithstanding this view, case study research is utilised extensively in academic enquiry in traditional social science disciplines as well as practice-oriented fields. As Yin states,<sup>8</sup> the need for a case study arises out of the desire to understand complex social phenomena and allows investigators to retain the holistic and meaningful characteristics of real-life events.

The research question this article seeks to answer is:

*What could New Zealand have done to make the most of the (lost) opportunity to improve taxpayers' rights arising as part of the 2017-2019 TWG deliberations and recommendations?*

As noted above, determination of an answer to this research question necessitates that an in-depth exploratory case study analysis be undertaken.

The remainder of this article is organised as follows: section 2 provides background to the state of taxpayers' rights in New Zealand, including an analysis of the prior New Zealand literature. Section 3 then explores the lost opportunity from the TWG's deliberations and recommendations, to the New Zealand government's response to those recommendations. It also sets out the state of play with respect to proposed reform through the TPWP. The situation that these events leave taxpayers in is explored in section 4 of the article, with section 5 setting out the concluding observations.

## 2. TAXPAYERS' RIGHTS IN NEW ZEALAND

When it comes to taxpayers' rights, views reflect the dichotomous positions taken as between IR/government and taxpayers/tax practitioners. The former, not surprisingly, are concerned about the integrity of the tax system and the generation of enough tax revenues to support their budgeted expenditures.<sup>9</sup> Specifically section 6(1) and (2) of the TAA state (emphasis added):

### **6(1) Best Endeavours to Protect Integrity of Tax System**

Every Minister and every officer of any government agency having responsibilities under this Act or any other Act in relation to the collection of

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<sup>8</sup> Robert K Yin, *Case Study Research and Applications: Design and Methods* (Sage Publications, 6th ed, 2017).

<sup>9</sup> See the provisions of sections 6 and 6A of the *Tax Administration Act 1994* (NZ) (TAA). For a discussion, see Jeremy Beckham, 'Inland Revenue's Strategic and Regulatory Management of Tax System Integrity and Taxpayer Perceptions' (2018) 33(4) *Australian Tax Forum* 701.

tax and for the other functions under the Inland Revenue Acts *must at all times use their best endeavours to protect the integrity of the tax system.*

## 6(2) Meaning of Integrity of Tax System

Without limiting its meaning, the integrity of the tax system includes—

- (a) the public perception of that integrity; and
- (b) the rights of persons to have their liability determined fairly, impartially, and according to law; and
- (c) the rights of persons to have their individual affairs kept confidential and treated with no greater or lesser favour than the tax affairs of other persons; and
- (d) the responsibilities of persons to comply with the law; and
- (e) the responsibilities of those administering the law to maintain the confidentiality of the affairs of persons; and
- (f) the responsibilities of those administering the law to do so fairly, impartially, and according to law.

Little concern over how individual taxpayers fare (or fear) when it comes to their rights is expressed in legislative terms. There will always be some casualties from a tax system that is operating well. One should not be fooled into believing that, since the current Business Transformation (BT) process being pursued by IR is making things easier for taxpayers to interact with IR, this will enhance their rights.<sup>10</sup> Taxpayers' rights are most at risk when it comes to divergent views between taxpayers/tax advisers and IR that lead to investigations and subsequently to disputes.

From a taxpayer perspective, perhaps surprisingly, the area of taxation where taxpayers (usually through tax practitioners and professional bodies) are able to exercise a right of engagement is through consultation via the *Tax and social policy engagement framework*.<sup>11</sup> In reality, taxpayers have little in the way of individual rights that are formally protected by statute. Notwithstanding calls for change, little has happened in this space. This issue will be explored further in the next subsection.

## 2.1 Taxpayers' rights – an overview

New Zealand is arguably unique amongst developed countries for the absence of a formal Constitution and few taxpayers' rights legislated for in statute. At the highest level is the *New Zealand Bill of Rights Act 1990* (NZBORA). This provides for several protections that extend to taxpayers, but the statute does not have the typical degree of

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<sup>10</sup> For further details on BT, see Inland Revenue, 'Business Transformation', <https://www.classic.ird.govt.nz/transformation/bt-programme/bt-programme-section-contents.html>.

<sup>11</sup> Inland Revenue, *Tax and Social Policy Engagement Framework* (August 2019). This paper governs how officials will engage on tax policy issues and on the social policy initiatives that are delivered by IR. It affirms a commitment to engagement and sets out what stakeholders should expect from officials.

constitutional protection, such as requiring a super majority of Parliament for amendment. Gupta observes:<sup>12</sup>

New Zealand does not have a single written constitution and it is one of only three countries in the world without a full and entrenched written constitution. *New Zealand's constitution, which is the foundation of its legal system, is drawn from a number of important statutes, judicial decisions, and customary rules known as constitutional conventions.* New Zealand's NZBORA 1990 is predicated on statutory construction as a means of protecting underlying rights and ensuring legislative consistency with human rights norms. However, *the NZBORA 1990 is neither entrenched nor supreme law and can be repealed by a simple majority of Parliament.* Because it is not supreme law, the NZBORA 1990 is in theory comparatively easy to reform, requiring only a majority of Members of Parliament to amend it. Although the courts in New Zealand are denied the power to strike down any legislation, s 6 of the NZBORA 1990 is a directive to the judiciary to, whenever possible, interpret a provision in a manner consistent with the rights and freedoms contained in the NZBORA 1990.

More generally Božović argues:<sup>13</sup>

Taxpayers' rights are a part of broader fundamental human rights and, as such, they are precisely defined in national legislation as a part of respecting these rights at the international level. *It is important to note that tax rights are generally universal, they apply to all taxpayers, and they are available to everyone under equal terms.*

The consideration of taxpayers' rights as part of human rights (for natural persons) emphasises their importance for protection and enforcement. However, in theory at least, the most fundamental of protections of New Zealand citizens (and taxpayers to a degree) via NZBORA is not fully entrenched and consequently is not fully enforceable. Nevertheless, while NZBORA is not supreme law in New Zealand, it has been very influential in developing rights discourse and standards in New Zealand against an international backdrop of constitutional law. However, this approach has not occurred within the domain of taxation. Arguably this is partly because the statutory environment for taxation is very resistant to rights-compliant statutory interpretation.<sup>14</sup> This can be interpreted as a situation that does not give rise to a problem endemic to the form of NZBORA, since the New Zealand courts have been prepared to use it where necessary, especially in criminal cases, but not in taxation generally.

The TAA is the most important statute that offers some protections to taxpayers. It provides for essential rights such as:

1. secrecy of taxpayer information (s 18, formerly 81);
2. legal professional privilege (s 20); and

<sup>12</sup> Ranjana Gupta, 'Rights against Unreasonable Search and Seizure in Tax: Canadian and New Zealand Approaches Compared' (2013) 19(3) *New Zealand Journal of Taxation Law and Policy* 222, 223 (emphasis added).

<sup>13</sup> Srđa Božović, 'Affirmation of the Legal Status of Taxpayers in Montenegro' (2016) 3 *Journal of Central Banking Theory and Practice* 121, 123 (emphasis added).

<sup>14</sup> See for example *Taxation Review Authorities Act 1994* (NZ) s 18, and TAA, s 17(1).

### 3. a limited nondisclosure right (ss 20B-20G).

Taxpayers may challenge the Commissioner's assessment through a dispute resolution process (Parts 4A and 8A of the TAA), where some of the component parts are non-legislated. Taxpayers can be represented by a tax agent/practitioner when dealing with their tax affairs.<sup>15</sup>

Section 6 of the TAA is not justiciable and does not create any enforceable taxpayers' rights. As noted earlier, it is important to remember that the section principally refers to the tax system and taxpayers collectively, rather than to taxpayers as individuals. Furthermore, a new legislative process has been introduced to provide an avenue for the Commissioner to deal with a 'legislative anomaly' (s 6C of the TAA). Concern has been expressed over the scope of this power which has been developed as part of BT.<sup>16</sup>

Inland Revenue's current Charter,<sup>17</sup> which first emerged in 2001, followed a distressing period where an overly zealous IR was driving a number of taxpayers to despair, including some to committing suicide.<sup>18</sup> IR's Charter is effectively a Code of Conduct outlining how IR will interact with taxpayers – it contains no new enforceable rights for taxpayers. Taxpayers are described as 'customers' accessing the services of IR.<sup>19</sup> Taxpayers may behave like customers when seeking information and making general inquiries, but this is certainly not the case when it comes to disputes. If taxpayers were customers, then the old marketing adage should apply: 'the customer is always right'. This 'claim' that the customer is always right does not always hold, since customers may be wrong, or they may be 'bad for business', or indeed not be sufficiently expert to form a 'correct view'. In a tax context, taxpayers as 'customers' are frequently found to be incorrect with respect to their tax position. Clearly IR's Charter largely fails to recognise the situation when a taxpayer has a different view to IR with respect to their tax affairs, and the 'customer' may in fact be right. The commencement point for IR is frequently: 'we are right, you the taxpayer are wrong, and you must prove we are wrong'. This is due to the immensely unfair reverse onus that applies to taxpayers in all civil tax challenges and disputes (s 149A of the TAA).

Inland Revenue offers a complaints management service which it runs internally. This is directly linked to its Charter and intends to cover complaints over Inland Revenue's service (a form of customer complaints service). It refers to the separate process for the formal disputes procedure and to the Ombudsman.<sup>20</sup>

The Office of the Ombudsman is also an avenue for taxpayers but only in limited circumstances.<sup>21</sup> The Ombudsman can investigate complaints about IR's administrative

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<sup>15</sup> This right was implicitly provided for in TAA, s 34B, which set out the requirements for tax agents and the Commissioner providing a list, until the section was repealed in 2019.

<sup>16</sup> See, for example, Shelley Griffiths, "'Fairly, Impartially and According to the Law": Thinking About Giving Effect to Taxpayer Rights in New Zealand Tax Administration' in *Tax Conference 2018: Taxpayers' Rights and Obligations in a Changing Tax World* (NZLS CLE Ltd, 2018) 151.

<sup>17</sup> Inland Revenue, 'Our Charter', <https://www.ird.govt.nz/about-us/charter>.

<sup>18</sup> Dave Henderson, *Be Very Afraid: One Man's Stand Against the IRD* (Christchurch FTG Trust, 1999).

<sup>19</sup> Professor John Prebble has criticised use of the term 'customer' to describe taxpayers: see John Prebble, 'Customers, Branding, and Mottoes in the New Zealand Inland Revenue Department' in Michael Walpole and Chris Evans (eds), *Tax Administration in the 21st Century* (Prospect Media Pty Ltd, 2001) ch 7.

<sup>20</sup> See above n 17, 2.

<sup>21</sup> See further New Zealand Ombudsman, 'Complaints About Government Agencies', <https://www.ombudsman.parliament.nz/what-we-can-help/complaints-about-government-agencies>.

conduct under the *Ombudsmen Act 1975*, and IR's decisions on requests for official information under the *Official Information Act 1982*. The Ombudsman can specifically investigate:

- IR's actions which are related to the manner in which a taxpayer's affairs are managed. For example: delays in responding to correspondence; delays in processing audits; and inadequate standard of service; and
- IR's acts or decisions from which there is no right of review or appeal. For example: refusals to remit non-shortfall penalties or interest; refusals to provide remissions or hardship relief; deduction of money from bank accounts; and over-payment of student loan/allowance refunds.

The Ombudsman cannot normally investigate decisions on tax assessments and decisions to impose tax shortfall penalties as these are limited to the provisions in the TAA.

There is no specific body that looks at systemic issues and makes recommendations for systemic change other than potentially the Finance and Expenditure Committee (FEC) of the New Zealand Parliament. The last time this occurred with respect to IR was the inquiry conducted by the FEC in the late 1990s.<sup>22</sup> The absence of such a specific body is a deficiency in the New Zealand system, especially given the limited scope of the role that the office of the Ombudsman can play.

Leaving the marketing perspective aside, should we be concerned about the limited relevance of IR's Charter for taxpayers, leaving an uneven playing field? This is the subject of the next subsection of this article.

## 2.2 Concerns over the uneven playing field position in New Zealand

It is not the purpose of this article to provide an exhaustive analysis of taxpayers' rights in New Zealand and their deficiencies. This has been undertaken on several prior occasions, including studies by the current author, Gupta (as noted earlier), Keating and Martin, to name some of the major contributors.

It has been argued previously that the position New Zealand taxpayers are in is a major concern, since individually they are almost at the complete whim of IR (with the implicit endorsement of the New Zealand government). This author, in the late 1990s, observed:<sup>23</sup>

... I believe that I have made the case that *New Zealand taxpayers have been short-changed in comparison with the civil and common law nations* reviewed

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<sup>22</sup> See Finance and Expenditure Committee, New Zealand Parliament, *Inquiry into the Powers and Operations of the Inland Revenue Department: Report of the Finance and Expenditure Committee* (October 1999), <http://taxpolicy.ird.govt.nz/publications/1999-other-inquiry-ird-fec/overview>. For a critique of the inquiry, see Adrian Sawyer, 'The Wine-Box Inquiry: Never Mind the Findings But What About the Recommendations?' (1998) 52(2) *Bulletin for International Taxation* 58; Adrian Sawyer, 'The Wine-Box Inquiry in New Zealand: Round Two – A "Gutted" Report But No "Knockout Punch"' (2001) 55(3) *Bulletin for International Taxation* 114.

<sup>23</sup> Adrian Sawyer, 'A Comparison of New Zealand Taxpayers' Rights with Selected Civil Law and Common Law Countries: Have New Zealand Taxpayers Been "Short-Changed"?' (1999) 32(5) *Vanderbilt Journal of Transnational Law* 1345, 1388-1389 (emphasis added; footnote omitted). The Mixed Member Proportional (MMP) voting system referred to here is discussed further in section 4 below.



in this article from a legal (formalistic) perspective and, more recently, from an informal point of view. The absence of a constitution protecting fundamental human rights, promoting only minimalist legal protection of rights through statutory means (which can be repealed by an ordinary majority of the unicameral Parliament), and the poor attempt at providing a charter (the Statement of Principles and the more recent Customer Charter), all require rectification as soon as possible. *If action is not taken, the worse-case scenario may eventuate – the rise of a government that ignores and overrides not only fundamental taxpayers' rights (which are currently provided through administrative enforcement accompanied by some legislative provisions), but also fundamental human rights.* The current legislative environment would facilitate such a government; it is only the political will and the current diversity of political parties under the MMP system that is preventing such tragic circumstances from developing.

This was the situation following the revelations of the culture within IR. Has the situation changed (for the good)? Martin, writing in 2013, observes that a number of major deficiencies in the New Zealand tax system remain with respect to taxpayers, namely: limitations in statutory disputes procedures; limitations in availability of judicial review of IR conduct; limits on taxpayers' rights generally; uncontrolled IR discretion; and a parliamentary bias in favour of IR. Martin concludes most aptly:<sup>24</sup>

While there is much to admire about the New Zealand tax system the limitations described in this article suggest that *aspects of the current system are out of balance because it does not adequately recognise and protect the rights of individual taxpayers in important areas.* If the great constitutional lawyer Sir Edward Coke were asked to review the position of taxpayer rights relative to the IRD's rights under the current tax system his response would be '*you need to do much better!*'

Martin's is not the last word on taxpayers' rights in New Zealand. Keating concludes more positively in his assessment of taxpayers' rights in New Zealand against a wider global perspective:<sup>25</sup>

...New Zealand's tax administration fails to comply with minimum standards in a number of key respects. *While we pride ourselves in the integrity and lack of corruption inherent in our tax system, we should not be complacent.*

Given these shortcomings, it may be surprising that our system works so well. But most of the *failures identified in the [IFA General] Report arise from the informality of our regime, which requires taxpayers to rely upon the discretion or good graces of Inland Revenue officers to protect their unwritten rights. Fortunately, in most instances, this system generally works.* The small size of our tax profession and the churn of individuals working for private practice and Inland Revenue engenders a level of personal cooperation and trust, and a mutual expectation and desire for the system to function properly. Furthermore,

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<sup>24</sup> See Martin, above n 5, 25 (emphasis added).

<sup>25</sup> Mark Keating, 'Protection of Taxpayer Rights in New Zealand: A Mixed Bag' (2018) 24(2) *New Zealand Journal of Taxation Law and Policy* 147, 169 (emphasis added), referring where noted to Philip Baker and Pasquale Pistone, 'General Report' in *Cahiers de Droit Fiscal International, Vol 100B: The Practical Protection of Taxpayers' Fundamental Rights* (2015) 17.

despite delays in access to the courts, an independent judiciary ensures any aberrations of conduct by the Commissioner (or individual officers) are effectively reigned in. Likewise, while much of Inland Revenue's decision-making lacks transparency, most issues of concern to taxpayers or their advisers are nevertheless brought to light at regular conferences or in practitioner or academic papers. As such, many of the apparent breaches of taxpayer rights identified in the Report are mitigated within our regime. Other breaches of minimum standards are rare or isolated, or are explicable in their narrow circumstances. *Accordingly, while not without its flaws, New Zealand's tax administration remains robust and is generally recognized as such internationally.*

Keating paints a picture of reliance or trust in IR to act fairly and to rectify 'breaches' of taxpayers' rights when they occur. He also suggests that the robust nature of tax administration has served to alleviate most of the issues when they arise. In any other advanced economy, the current author would argue that such a situation would not be tolerated and unlikely to operate for long. It places taxpayers at the whim of unelected officials. Furthermore, this all occurs within an uneven playing field tilted in favour of IR. Keating's statement reflects a position or philosophy that is certainly far from universally held by tax practitioners and commentators. While professional bodies, such as Chartered Accountants Australia and New Zealand (CA-ANZ), act as advocates for their members, there is no general advocacy service for taxpayers in New Zealand. As noted earlier, the Ombudsman is very limited in the assistance that the Office can provide taxpayers.

Most recently the author was responsible for preparing the 2019 report from New Zealand for the IBFD Observatory on the Protection of Taxpayers' Rights.<sup>26</sup> Essentially the report provides little evidence of improvement from the last New Zealand report prepared in 2017 and released in 2018. While many minimum standards are complied with, there remain serious deficiencies and gaps, indicating significant room for improvement.

The situation described above was to remain, at least until the TWG was established in 2017 to provide recommendations to the government that would improve the fairness, balance and structure of the New Zealand tax system over the next 10 years.<sup>27</sup> Within this broad brief, it would have been expected that the TWG would examine the operation of the administration of the tax system, including its impact on taxpayers. This will be the subject of the next section of this article.

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<sup>26</sup> This report has recently been publicly released: see Adrian Sawyer (National Reporter of New Zealand), Report on New Zealand to the IBFD Observatory on the Protection of Taxpayers' Rights 2019 (7 January 2020), <https://www.ibfd.org/sites/ibfd.org/files/content/pdf/National%20Report%20of%20New%20Zealand%20%28Adrian%20Sawyer%29.pdf>. The 2017 report was prepared by New Zealand tax barristers Mike Lennard and Mark Keating.

<sup>27</sup> See generally <https://taxworkinggroup.govt.nz/what-is-the-tax-working-group.html>.

### 3. THE TWG 2017-2019 AND THE NEW ZEALAND GOVERNMENT'S RESPONSE

The TWG was established by the Labour-led coalition government in 2017 following the general election. Within its terms of reference, the TWG was requested to report on:<sup>28</sup>

- *Whether the tax system operates fairly in relation to taxpayers, income, assets and wealth;*
- Whether the tax system promotes the right balance between supporting the productive economy and the speculative economy;
- *Whether there are changes to the tax system which would make it more fair, balanced and efficient; and*
- Whether there are other changes which would support the integrity of the income tax system, having regard to the interaction of the systems for taxing companies, trusts, and individuals.

The TWG was permitted to recommend further reviews be undertaken on specific issues which the TWG considered it had not been able to explore sufficiently, or that were excluded from its terms of reference, but which could benefit from being considered in the context of its recommendations. A Secretariat of officials from Treasury and IR supported the TWG. Importantly, the TWG was able to seek independent advice and analysis on any matter within the scope of its Terms of Reference. In this regard, the TWG had its own independent adviser to analyse the various sources of advice received and to help analyse and distil the information to assist it with its deliberations. In developing its recommendations, the TWG engaged extensively with the public. This included running polls and producing an Interim Report<sup>29</sup> for which it sought submissions as part of its consultation process.

The TWG, in developing both its Interim Report and Final Report,<sup>30</sup> sought to be open and transparent, with consultation with the wider public encouraged. Over 6,700 members of the public made submissions to the TWG on the initial issues raised, a New Zealand record. The casting of around 16,000 votes on quick polls run by the TWG is further evidence of engagement with the wider public.<sup>31</sup> These submissions and votes influenced the content of the TWG's Interim Report, and to a lesser degree, the Final Report. In this regard, the TWG stood out in terms of involving the wider public beyond those that would usually make submissions on proposed tax policy changes.

Thus, the TWG offered promise that a review of taxpayers' rights would form part of its deliberations. As will be discussed in the next subsection, the early expectations were

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<sup>28</sup> Hon Grant Robertson (Minister of Finance), 'Terms of Reference: Tax Working Group', above n 1 (emphasis added).

<sup>29</sup> Tax Working Group (Hon Michael Cullen, chair), *Future of Tax: Interim Report* (20 September 2018), <https://taxworkinggroup.govt.nz/resources/future-tax-interim-report>.

<sup>30</sup> See Tax Working Group (Hon Michael Cullen, chair), *Future of Tax: Final Report*, above n 3, Vol I – Recommendations.

<sup>31</sup> See Tax Working Group, '6,700 Submissions Received in Tax Working Group Consultation', *Media Release* (1 May 2018), <https://taxworkinggroup.govt.nz/resources/6700-submissions-received-tax-working-group-consultation>.

high, illustrated by the wide-ranging recommendations of an independent report to the Secretariat that was subsequently made available on the TWG's website.

### 3.1 Contributions to taxpayers' rights – an independent report to the TWG

Throughout the deliberations of the TWG over the approximately 18 months of operation, the TWG maintained a record of its meetings, including documents provided to it by the TWG Secretariat.<sup>32</sup> In developing its recommendations, the Secretariat to the TWG provided a report it had commissioned on the suitability of establishing a tax ombudsman and a tax advocate. The report to the TWG Secretariat found:<sup>33</sup>

Based on a review of other jurisdictions I consider *New Zealand's tax system has fallen well behind current international developments in best practice for taxpayer rights and dispute resolution*. These failings are *jeopardising the procedural fairness of the tax system*. They represent a *threat to the integrity of the tax system and taxpayers' perception of that integrity*.

The recommendations in this report to the TWG Secretariat went much further than the TWG would subsequently recommend, stating:<sup>34</sup>

1. The Ombudsman's office should appoint a *properly resourced deputy ombudsman with sole responsibility for oversight of complaints involving Inland Revenue (IR)*. This would be in line with current best practice developments outside New Zealand.
2. A clear, accessible and affordable disputes process is integral to the integrity of the tax system. The present disputes regime is expensive and its cost acts as a bar to smaller taxpayers in particular, prompting the question of whether a taxpayer advocate is required to provide assistance. Furthermore, there has been a very marked fall-off in substantive tax cases appearing in the courts. This fall-off has been the subject of comment from two Supreme Court Justices. *If taxpayers feel the disputes process is not available to them then that represents a threat to taxpayers' perception of the integrity of the tax system*.
3. This threat can be countered by *simplifying the current disputes process to reduce costs principally by allowing earlier use of IR's Dispute Resolution Unit*. In conjunction with this reform, *IR should establish a Taxpayer Advocate Service (TAS) similar to the Taxpayer Advocate Service run by the United States Internal Revenue Service*.
4. The TAS would have responsibility for providing assistance to low income earners, small businesses and individuals with English as a second language who are engaged in a dispute with IR over the quantum of tax payable. *Qualifying taxpayers would be able to request assistance from the TAS where the core tax in dispute is under \$50,000*.

<sup>32</sup> For further details see the Tax Working Group's website at: <https://taxworkinggroup.govt.nz/>.

<sup>33</sup> See Third Party for the Tax Working Group, *Report on the Suitability of Establishing a Tax Ombudsman and a Tax Advocate: Third Party Report*, above n 2, 1 (emphasis added).

<sup>34</sup> Ibid 1-2 (emphasis added). As part of making its recommendations, the report's author had surveyed members of the Accountants and Tax Agents Institute of New Zealand (ATAINZ) and the Institute of Certified New Zealand Bookkeepers (ICNZB).

5. *Taxpayers who received assistance from the TAS in relation to a dispute with IR should retain their existing appeal rights.* The involvement of the TAS would be an integral part of a reformed dispute regime, rather than an adjunct of it as initially suggested.
6. *As part of IR's Charter obligations, the TAS should also adopt the Australian Tax Office's (ATO) Dispute Assist programme.* This would provide assistance to qualifying taxpayers with other issues with IR outside the disputes process such as payment of tax due, repayment of overpaid tax credits, child support and student loans.
7. *Although within IR, the head of the TAS would report directly to Parliament's Finance and Expenditure Committee (FEC).* We suggest the head of the TAS is appointed from outside IR. *This should promote the independence of the TAS and therefore boost public confidence in the service.*
8. *Consideration should be given into developing the current IR Charter into a formal taxpayers' Bill of Rights similar to that available to taxpayers in the United States.* It appears taxpayer and tax agents' knowledge of the Charter is not widespread. *IR should promote taxpayer knowledge of the Charter and its annual report to the FEC should include specific details on its progress in promoting the Charter.*

The significance of these recommendations should not be underestimated. At one level they are indicative of how New Zealand has failed to keep up with international (best) practice in terms of supporting taxpayers when they have disputes with IR in an extremely unbalanced environment. Even the New Zealand judiciary has indicated that the current disputes process is not working as it should and is potentially failing taxpayers.<sup>35</sup> That said, the recommendations to address shortcomings extend beyond the disputes process to providing first hand support to taxpayers to encompassing an independent complaints service through extending the Office of the Ombudsman, and potentially to creating formal taxpayers' bill of rights.

From a taxpayer's perspective, these recommendations in the independent report are both reasonable and desirable to provide a remedy for reversing the gradual decline in effective taxpayers' rights in New Zealand. They also suggest there are real risks to the integrity of the tax system, something that should be of significant concern to IR and the New Zealand government. In this respect the US's National Taxpayer Advocate Service (NTAS) is recommended as a model to pursue, to which the author fully concurs.<sup>36</sup> It is also suggested that IR monitor the progress of Curtin University's tax clinic, an initiative subsequently rolled out across Australia.<sup>37</sup> These tax clinics now operate throughout large parts of Australia (building upon the success of the original Curtin University tax clinic, with expansion made possible through Federal government

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<sup>35</sup> See, for example, Hon Justice William Young, 'Keynote Address: Tax Disputes in New Zealand' (2009) 4(1) *Journal of the Australasian Tax Teachers Association* 1.

<sup>36</sup> See <https://taxpayeradvocate.irs.gov/>. The success of the NTAS can be largely credited to the leadership of the immediate past Taxpayer Advocate, Nina Olson. Ms Olson is continuing her work through the recently established Center for Taxpayer Rights; see further: <https://taxpayer-rights.org/>.

<sup>37</sup> See Third Party for the Tax Working Group, *Report on the Suitability of Establishing a Tax Ombudsman and a Tax Advocate: Third Party Report*, above n 2, 12.

support).<sup>38</sup> In the US, the tax clinic model has been pioneered through the low income taxpayers' clinic (LITC) within the NTAS.<sup>39</sup> New Zealand could do well to explore the possibility for such clinics for micro and small business taxpayers. That said, for individual taxpayers (such as wage and salary earners), with their income having tax deducted at source and no ability to deduct expenses, there is little need for them to interact with IR other than through the online platform MyIR.<sup>40</sup> Tax clinics would not be expected to see much demand for their services from this group, other than to assist some that are 'digitally challenged'. Further discussion of this issue is beyond the scope of this article.

Overall, it would be a surprise if these recommendations were not challenged by IR (at least internally). Also, as will be discussed further shortly, the TWG failed to give full support to them in its recommendations to the New Zealand government. Inland Revenue in the past has not been willing to leave the development of a charter to the New Zealand government; it soon developed its own charter which is little more than a Code of Conduct.<sup>41</sup> Inland Revenue preferred to set up its own internal complaints management service, rather than see an expanded role for an independent Tax Ombudsman.<sup>42</sup>

Indeed, the recommendations from this independent report to the TWG Secretariat could have been even more expansive. The report observes that the Inspector-General of Taxation (IGT) was created in 2003 in Australia, taking over responsibility for handling taxpayer complaints about the Australian Taxation Office from the Commonwealth Ombudsman in 2015. A similar body was not advocated for establishing in New Zealand, suggesting that an expanded Office of the Ombudsman would suffice. So how did these recommendations fare when put under scrutiny by the TWG? The next subsection indicates that from this point onwards there would be little additional support recommended to bolster taxpayers' rights in New Zealand.

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<sup>38</sup> See Australian Taxation Office, 'National Tax Clinic Program', <https://www.ato.gov.au/General/Gen/National-Tax-Clinic-program/>. The success of the Australian tax clinic program overall is largely credited to the success of the first clinic set up by Annette Morgan at Curtin University, who is the clinic director. Tax clinics are currently available through the following universities in Australia: (Australian Capital Territory) Australian National University Tax Clinic – Canberra; (New South Wales) University of New South Wales Tax Clinic – Sydney and Western Sydney University Tax Clinic – Parramatta; (Northern Territory) Charles Darwin University Tax Clinic – Darwin, Alice Springs, and Katherine; (Queensland) Griffith University Tax Clinic – Logan and James Cook University Tax Clinic – Townsville; (South Australia) University of South Australia Tax Clinic – Adelaide; (Tasmania) University of Tasmania Tax Clinic – Hobart; (Victoria) Melbourne Law School Tax Clinic – Melbourne; and (Western Australia) Curtin University Tax Clinic – Perth.

<sup>39</sup> See generally: <https://www.irs.gov/advocate/low-income-taxpayer-clinics>. For an excellent discussion on the development of the clinics in the US, see T Keith Fogg, 'History of Low-Income Taxpayer Clinics' (2013) 67(1) *Tax Lawyer* 3. Fogg provides a chronological history of low-income tax clinics in the United States from their inception in 1974 to 2012. Contributions of the key leaders in their development are discussed, along with the role of particular institutions, with comments offered on the challenges that lie ahead.

<sup>40</sup> MyIR was set up as part of the early stages of IR's Business Transformation project, through which taxpayers can access securely their tax details and interact with IR.

<sup>41</sup> In a response to the Inquiry into IR in the late 1990s, it prepared its own charter; see above n 17.

<sup>42</sup> See <https://www.ird.govt.nz/contactus/complaints-disputes-compliments>.

### 3.2 The TWG's recommendations – the first lost opportunity

The TWG, established in late 2017, made its Final Report public on 21 February 2019. Amongst the numerous recommendations were several that are most pertinent to protecting taxpayers' rights in New Zealand. Specifically, the TWG recommended:<sup>43</sup>

31. The Group also recognises there is a need to *improve the resolution of tax disputes*. The Group recommends the establishment of a *taxpayer advocacy service to assist taxpayers in disputes with Inland Revenue and also recommends that the Office of the Ombudsman be adequately resourced to carry out its functions in relation to tax*.

32. Following the introduction of a taxpayer advocacy service, the Group recommends that *the Government design a truncated tax dispute process for small taxpayers*.

These two recommendations can be traced to the independent report provided to the TWG Secretariat and included as part of the TWG's deliberations. Importantly, the recommendations, if accepted, would see the Office of the Ombudsman enhanced from a resources perspective (leaving it to the Office of the Ombudsman<sup>44</sup> to determine how to best utilise these resources, whether it be a dedicated ombudsman to handle tax issues, or otherwise; this could be influenced by the level of additional resources). Importantly it also suggested that a taxpayer advocacy service be established, although little detail was offered. The final recommendation was for a truncated tax disputes process.

If this is aligned against the independent report provided to the Secretariat, there is no recommendation for an NTAS, like that in the US. Neither is there clear direction as to how the disputes process could be improved to assist taxpayers. Unsurprisingly, there is no appetite for the consideration of a formalised taxpayer bill of rights like that in the US. Indeed, the author would argue there is a distinct avoidance of anything that could suggest inspiration from the US for developments in taxpayers' rights in New Zealand. A taxpayer assist programme, like that in Australia through the Australian Taxation Office, was also not recommended.<sup>45</sup> A recommendation for the introduction of a taxpayer mediation service is also notable by its absence.<sup>46</sup>

An 'independent' assessment of the TWG's contributions to improving taxpayers' rights in New Zealand, in the context of material it had at its disposal to consider, is at best a C-pass. To be clear, the independent report provided to the TWG certainly recommended positive improvements directed at enhancing taxpayers' rights in New Zealand. Unfortunately, in the current author's view, the recommendations in TWG's

<sup>43</sup> Tax Working Group (Hon Michael Cullen, chair), *Future of Tax: Final Report*, above n 3, Vol I – Recommendations, 102 (emphasis added).

<sup>44</sup> See <https://www.ombudsman.parliament.nz/>.

<sup>45</sup> For an excellent analysis of how this program could be developed in New Zealand, see Melinda Jone, 'A Preliminary Evaluation of Australia's Tax Dispute Resolution System in the Context of the ATO's Reinvention Program' (2019) 34(3) *Australian Tax Forum* 513.

<sup>46</sup> For a discussion of how this could be developed, see Melinda Jone, 'A Proposed Small Claims Tax Mediation Regime for New Zealand's Tax Dispute Resolution Procedures' (2019) 25(4) *New Zealand Journal of Taxation Law and Policy* 321. See also Melinda Jone and Andrew Maples, 'Small Tax Dispute Resolution in New Zealand: Is There a Better Way? A Consideration of Overseas Processes' (2019) 25(2) *New Zealand Journal of Taxation Law and Policy* 137. For a more global perspective, see Diana van Hout, 'Is Mediation the Panacea to the Profusion of Tax Disputes?' (2018) 10(1) *World Tax Journal* 43.

report fail to contain significant detail, and left much of the content of the recommendations from the external report 'by the wayside'. This, in the author's view, is the first lost opportunity to enhance taxpayers' rights in New Zealand. Furthermore, it is also significant that through failing to recommend major change, it would be unlikely that the New Zealand government would choose to go further than what was recommended, especially since enhancing taxpayers' rights is not necessarily perceived as enhancing tax system integrity, and is unlikely to be a significant 'vote winner'. The current author suggests, as did the author of the independent report to the Secretariat, that reform would enhance tax system integrity. So just how did the New Zealand government respond?

### 3.3 The New Zealand government's response – a second lost opportunity

On 17 April 2019 the New Zealand government released its response.<sup>47</sup> This is included in a summary sheet in response to the various recommendations of the TWG, with the key part set out below in Table 1.

**Table 1: Administration of the Tax System**

<b><i>Ombudsman</i></b>		
72	Any further expansion of the resources available to the Ombudsman should include consideration of provision for additional tax expertise, and possibly support to manage any increase in the volume of complaints relating to the new Crown debt collection agency proposed by the TWG.	<b>Agree no further work required</b> at this stage unless there is an unsustainable increase in complaints.
<b><i>Taxpayer advocate service</i></b>		
73	Establish a taxpayer advocacy service to assist with the resolution of tax disputes.	<b>Agree no further work required</b>
74	Consider a truncated tax disputes process for small taxpayers.	<b>Consider for inclusion on work programme (TPWP)</b>

Source: The Government's response to the recommendations of the Tax Working Group – 17 April 2019 (Response table); Robertson and Nash.<sup>48</sup>

Table 1 provides dismal reading for advocates of taxpayers' rights. Unless there is mounting evidence of an 'unsustainable increase' in complaints, whatever that means, there will be no further work in expanding the resources of the Ombudsman or through

<sup>47</sup> See Robertson and Nash, above n 4.

<sup>48</sup> Ibid.



the recommended new Crown debt collection agency.<sup>49</sup> If that was not bad enough, the next recommendation for a taxpayer advocacy service is rejected. No reasons are provided, although it can be inferred that the New Zealand government is satisfied with the current uneven playing field as it ensures a robust tax system that provides increasing levels of revenue to meet expenditures. There is no concern as to how this system is impacting on individual taxpayers. A proactive approach appears to be at odds with the government's philosophy. For a government that is left of centre and that claims it is intending to redress imbalances in favour of individuals over larger businesses, this response is counterintuitive. Perhaps this is in part due to the complex relationship between the three parties that 'govern' New Zealand; for example, the New Zealand First governing coalition party scuppered any chance of reasoned debate on a capital gains tax (CGT) for New Zealand.<sup>50</sup> As an outsider one can only speculate.

The only glimmer of hope for any improvement in taxpayers' rights is the decision of the New Zealand government to consider putting the development of a truncated tax disputes process for small taxpayers on the TPWP. This leads into the next subsection – what of the TPWP and a truncated tax disputes process for small taxpayers?

### 3.4 Current position – the TPWP – will this opportunity be taken up?

The TPWP represents, at a given point in time (8 August 2019 being the latest public version at the time of writing), the workstreams underway by IR and Treasury staff with respect to the New Zealand government's priorities. An examination of the current TPWP reveals a major disappointment for the most optimistic of taxpayers' rights advocates, namely the absence of any reference to a truncated tax disputes process for small taxpayers. This can be interpreted in a number of ways: first, this is a very low priority with other more important matters in need of redress (possible but unlikely); second, the New Zealand government only indicated that it would 'consider' the issue and has not as yet put its mind to what it will do (the view of the ultimate optimist); or three, it is hoped by the relevant parties that through the absence of a timeframe no one will notice that this proposal never makes it onto the TPWP (with no explanation as to why it does not appear – perhaps the sad reality). Time will tell as to whether this opportunity is taken up.

Thus, the current position is that taxpayers' rights in New Zealand should not be expected to improve as a result of deliberations of the TWG and subsequent New

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<sup>49</sup> This proposed Crown debt collection agency was suggested by the TWG to enable consistent rules for treatment of debtors, to achieve economies of scale and more equitable outcomes across all Crown debtors; see Tax Working Group (Hon Michael Cullen, chair), *Future of Tax: Final Report*, above n 3, Vol I – Recommendations, 101.

<sup>50</sup> As at the time of writing, New Zealand has a coalition government with two separate agreements – a formal coalition agreement between the Labour Party and New Zealand First Party, and a separate confidence and supply agreement between the Green Party and the Labour Party. After the 2020 general election, the Labour Party was able to form a government without the need for any coalition partner, although it entered into an agreement with the Green Party. In relation to New Zealand First's actions on the CGT proposal, see John Anthony, 'NZ First Put An End to Capital Gains Tax, Shane Jones Admits in Post-Budget Speech', *Stuff.co.nz* (31 May 2019), <https://www.stuff.co.nz/business/industries/113143586/nz-first-put-an-end-to-capital-gains-tax-shane-jones-says-in-postbudget-speech> (accessed 20 August 2020). For an extensive analysis of why the CGT proposal is likely to have failed, see David Sutton, 'Why New Zealand Is Alone in the OECD in Resisting the Introduction of a Capital Gains Tax: Examining the Recent Debate' (2020) 26(1) *New Zealand Journal of Taxation Law and Policy* 31.

Zealand government response. The current uneven playing field will remain unless the level of complaints is so large that it 'forces' action (a reactionary response), or a more benevolent government is elected at some point that wishes to improve the position of taxpayers' rights in a proactive manner (a highly unlikely eventuality given the agendas of recent governments).

#### 4. WHERE DOES THIS LEAVE US AND WHAT ARE THE PROSPECTS FOR THE FUTURE?

The TWG provided what this author believed to be an excellent opportunity to review the New Zealand tax system. Indeed, such reviews are a reasonably frequent event in New Zealand, occurring on average every 8-10 years.<sup>51</sup> Unfortunately the TWG appears to have suffered a similar fate of prior reviews, well-illustrated by its rather 'timid' recommendations concerning enhancing taxpayers' rights, and the New Zealand government's lukewarm minimalist response (a familiar outcome). Thus, taxpayers' rights are virtually unchanged from their position prior to the TWG, with no evidence of any (significant) improvement likely to occur soon. An important opportunity created by the establishment of the TWG, and an excellent independent report recommending major enhancements to taxpayers' rights, have failed to bring about any movement toward significant change with respect to taxpayers' rights in New Zealand.

So what can be taken away from the preceding discussion, including the 'failure' of the TWG to not only accept the need for reform of taxpayers' rights, but also to put up convincing arguments in an attempt to 'persuade' the New Zealand government to take action? It is reflective of an endemic lack of genuine concern for taxpayers' rights in New Zealand for over 30 years, since IR came under public scrutiny in the late 1990s with the Finance and Expenditure Select Committee's Inquiry into IR.<sup>52</sup> This Inquiry made a number of recommendations that would enhance taxpayers' rights if put into effect:<sup>53</sup>

19. The Government *establish a specialist tax adviser position within the Office of the Ombudsman, with appropriate resources, to investigate matters of tax administration by the Inland Revenue Department. ...*
24. The Government consider whether establishing a board of directors to provide an oversight of the Inland Revenue Department's operation of its powers is desirable. ...
27. The Inland Revenue Department establish a *taxpayers' charter to outline to taxpayers their rights and obligations in respect of the tax system.*

The principal issues of concern at the time of the Inquiry into IR at the time were:<sup>54</sup>

- The underlying structure of the penalties regime is sound. However, the rates of penalty are excessive in some cases and should be reduced,

<sup>51</sup> The history of such review, along with a recommendation for a new approach incorporating a new statutory permanent oversight body (the New Zealand Taxation Review Commission) is a significant work to be published later in 2020; see Adrian Sawyer, *The Contributions of New Zealand Tax Committees and a New Model Moving Forward: The New Zealand Taxation Review Commission* (Centre for Commercial and Corporate Law Inc, Christchurch, 2020) 89.

<sup>52</sup> See Finance and Expenditure Committee, above n 22.

<sup>53</sup> Ibid 5-6 (emphasis added).

<sup>54</sup> Ibid 8 (emphasis added).

and there is a need for greater flexibility on the part of the department in its operation of the regime, without unduly compromising fairness and equity to all taxpayers.

- *The importance of the perception by taxpayers that the tax law and its administration is fair and appropriate. Improvements are needed in this area.*
- *More checks and balances on the department's exercise of its powers are required to enhance the integrity of the tax system.*
- The first principle of the department's debt management practices should be consistent with the statutory responsibility to collect the highest net revenue over time, not collection at any cost.
- The department's debt management practices should include early warning systems and involve more senior personnel who are and can be seen as independent and impartial.
- *There is a need for an internal system for the resolution of taxpayer complaints and problems to prevent problems escalating and being brought to the attention of the Ombudsman.*
- *While we do not find that the department's structure and approach in its dealings with taxpayers is fundamentally flawed, there is a need for a cultural shift in the department to reflect a greater customer oriented ethos. This shift must be driven from the senior management team.*

The highlighted points all have a direct bearing on taxpayers' rights. While IR has taken a customer focus (as discussed earlier, this is a strained concept given in many respects that taxpayers are not really customers), little has been done in the other areas. While IR may dispute this, the evidence remains of an uneven playing field with these issues raised again during the TWG's deliberations.

Turning the focus to the legislative environment, within the TAA, there is a statement concerning taxpayers' obligations set out in s 15B of the TAA (emphasis added):

### **15B Taxpayer's Tax Obligations**

A taxpayer must do the following:

(aa) if required under a tax law, make an assessment:

(a) unless the taxpayer is a non-filing taxpayer, correctly determine the amount of tax payable by the taxpayer under the tax laws:

(b) deduct or withhold the correct amounts of tax from payments or receipts of the taxpayer when required to do so by the tax laws:

(c) pay tax on time:

(d) keep all necessary information (including books and records) and maintain all necessary accounts or balances required under the tax laws:

(e) disclose to the Commissioner in a timely and useful way all information (including books and records) that the tax laws require the taxpayer to disclose:

(f) to the extent required by the Inland Revenue Acts, co-operate with the Commissioner in a way that assists the exercise of the Commissioner's powers under the tax laws:

(g) *comply with all the other obligations imposed on the taxpayer by the tax laws.*

(h) [Repealed]

(i) [Repealed].

While this looks to be straightforward, paragraph (g) makes it clear that there are other laws with which taxpayers will need to comply. In many instances they will need a specialist tax adviser to ensure they meet all their obligations. Compliance is particularly important given the comprehensive and harsh penalties regime contained in Part 9 of the TAA (supplemented by the *Crimes Act 1961*). While there is a specific statement of taxpayer obligations in section 15B of the TAA, there is no corresponding section summarising taxpayers' rights. Rather a taxpayer needs to work through the relevant legislation to determine their rights (and/or seek professional assistance). As noted earlier these rights are more limited in comparison to taxpayers' obligations.

The author has previously attempted,<sup>55</sup> as a starting point for discussion, to set out what could be included in a new section 15C of the TAA (these 'rights' would be in addition to a more substantial taxpayers' charter/bill of rights):

#### **[Proposed] 15C Taxpayer's Tax Rights**

A taxpayer is entitled to:

- (a) Reasonable certainty as to tax liability:
- (b) Full explanation of basis of an (re)assessment:
- (c) Equal, fair and courteous treatment under the law:
- (d) Adequate information on challenge rights:
- (e) Reasonable costs of independent review and prompt resolution:
- (f) Be advised of a right to confidential advice (and to receive such advice):
- (g) Be advised of right to representation and natural justice:
- (h) Utilise their rights without adverse inferences being made:
- (i) A right to privacy as set out in s 18 [formerly s 81] unless specifically exempted by law:

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<sup>55</sup> See Adrian Sawyer, 'TAAC-15B - Taxpayer's Tax Obligations' in *Brookers Smart Tax Commentary* (1999), proposing a new § 15C should be added to the Tax Administration Act.

(j) Compensation for loss arising from unlawful action:

(k) Impartial dispute resolution service which is adequately resourced.

These 'rights' for taxpayers should be viewed in conjunction with the US Taxpayers' Bill of Rights, which are enshrined in legislation, and contain the following:<sup>56</sup>

- The Right to Be Informed
- The Right to Quality Service
- The Right to Pay No More than the Correct Amount of Tax
- The Right to Challenge the IRS's Position and Be Heard
- The Right to Appeal an IRS Decision in an Independent Forum
- The Right to Finality
- The Right to Privacy
- The Right to Confidentiality
- The Right to Retain Representation
- The Right to a Fair and Just Tax System.

New Zealand would also do well look to other jurisdictions such as Canada for administrative protections of taxpayers' rights (English version, emphasis added):<sup>57</sup>

- You have the right to receive entitlements and to pay no more and no less than what is required by law
- You have the right to service in both official languages
- You have the right to privacy and confidentiality
- You have the right to a formal review and a subsequent appeal
- You have the right to be treated professionally, courteously, and fairly
- You have the right to complete, accurate, clear, and timely information
- You have the right, unless otherwise provided by law, not to pay income tax amounts in dispute before you have had an impartial review
- You have the right to have the law applied consistently

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<sup>56</sup> See Internal Revenue Service, 'Taxpayer Bill of Rights', <https://www.irs.gov/taxpayer-bill-of-rights>. For an excellent series of articles examining taxpayers' rights in the US, see the special issues of the *Temple Law Review*, (2019) 91(4), and *Journal of Tax Administration*, (2018) 4(2).

<sup>57</sup> See Canadian Revenue Agency, 'Taxpayer Bill of Rights Guide: Understanding Your Rights As a Taxpayer', <https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/rc17/taxpayer-bill-rights-guide-understanding-your-rights-a-taxpayer.html>.

- You have the right to lodge a service complaint and to be provided with an explanation of our findings
- *You have the right to have the costs of compliance taken into account when administering tax legislation*
- You have the right to expect us to be accountable
- You have the right to relief from penalties and interest under tax legislation because of extraordinary circumstances
- You have the right to expect us to publish our service standards and report annually
- You have the right to expect us to warn you about questionable tax schemes in a timely manner
- You have the right to be represented by a person of your choice
- You have the right to lodge a service complaint and request a formal review without fear of reprisal.

It needs to be remembered that anything like the author's proposed section 15C of the TAA set out above has never been suggested publicly by IR or the New Zealand government. Furthermore, the author does not expect it to be raised unless there is a fundamental change in culture in New Zealand with respect to protecting taxpayers' rights through legislative means.

Overall, New Zealand has a 'poor' history of legislating for taxpayers' rights but rather has focused on administrative statements of 'rights' that are largely unenforceable, placing reliance on a reasonably benevolent revenue authority. The New Zealand tax system is weighted hugely in favour of IR creating an uneven playing field. The New Zealand Parliament appears to be happy with this position and shows no sign of changing, regardless of whether a government is on the 'left' or 'right' of centre (evidenced by the last two governments – a National-led coalition 'right of centre' government and a Labour-led coalition 'left of centre' government).

Furthermore, taxpayers have generally not been able to successfully allege breaches of their (human) rights, although cases have often not had 'favourable facts' from the perspective of the taxpayers concerned.<sup>58</sup> The only redeeming feature is New Zealand's very low level of corruption<sup>59</sup> and relatively benign public service. The Mixed Member

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<sup>58</sup> See, for example, *Amaltal Fishing Company Ltd v Commissioner of Inland Revenue* [2009] NZHC 34, 24 NZTC 23,313 (HC); *Hardie v Commissioner of Inland Revenue* [2010] NZHC 412, 24 NZTC 24,161 (HC); *Tamihere v Commissioner of Inland Revenue* [2013] NZHC 1651, 26 NZTC 21,021 (HC); *Tamihere v Commissioner of Inland Revenue* [2014] NZHC 1986, 26 NZTC 21,094 (HC); *Tamihere v Commissioner of Inland Revenue* [2017] NZHC 2949, 28 NZTC 23-042(HC); *Tamihere v Commissioner of Inland Revenue* [2018] NZHC 392, 28 NZTC 23-054 (HC). Other tax-related cases include: *Re Commissioner of Inland Revenue, ex parte Musuku* [2016] NZHC 2773, 27 NZTC 22-078; *Henderson v Walker* [2019] NZHC 2184.

<sup>59</sup> See Transparency International's 2019 rating of perceptions of corruption, where NZ is first equal for having the lowest precepted level of corruption: Transparency International, 'CPI 2019 Global Highlights' (20 January 2020), [https://www.transparency.org/news/feature/cpi\\_2019\\_global\\_highlights](https://www.transparency.org/news/feature/cpi_2019_global_highlights).

Proportional (MMP) political system,<sup>60</sup> in the author's view, has acted as a partial mediator to any further erosion of taxpayers' rights, principally through the role played by minor parties that form part of, or support, a larger party when in government. Equally, it is the author's view that MMP conceptually has done little to enhance taxpayers' rights in New Zealand. The minor parties also have little to show for how they have sought to enhance taxpayers' rights in New Zealand.

## 5. CONCLUDING OBSERVATIONS

The subject of taxpayers' rights is a sensitive one in that it tends to polarise commentators and governments/revenue authorities, highlighting a major chasm between revenue authorities/governments and taxpayers/tax practitioners generally. Indeed, in most common law jurisdictions, the investigations and disputes processes (where taxpayers' rights are most frequently tested), are premised on an adversarial approach. Governments want to secure revenue and maintain the integrity of their tax system, while taxpayers want their tax affairs to be dealt with fairly with their rights protected (and in many instances enhanced). Poor taxpayers' rights protection, accompanied by increased powers for the revenue authority, can lead to a reduction in trust in government and in levels of compliance. This can turn into a downward spiral. Even in many civil law jurisdictions, there is a degree of an adversarial approach as between the revenue authority and taxpayers.

It might be argued that governments and revenue authorities appear to be 'afraid' of opening themselves to greater independent scrutiny through providing well-resourced independent forms of complaint resolution, support for vulnerable taxpayers, and taxpayer-supportive disputes resolution processes. Governments also appear reluctant to create real and legislatively backed taxpayers' rights where this would reduce the imbalance in favour of the revenue authority (and potentially reduce revenue collection). A few administrations and governments have seen the benefit of enhancing taxpayers' rights, through initiatives such as the NTAS and the Taxpayer Bill of Rights in the US, various types of tax clinics (Australia and the US), an Inspector General of Taxation and Board of Taxation (Australia), to name a few. New Zealand has a poor scorecard in comparison to these (and other) jurisdictions. It can, and indeed must, do better. Unfortunately, it has missed an excellent opportunity to do so.

Earlier in the article the following research question was posed:

*What could New Zealand have done to make the most of the (lost) opportunity to improve taxpayers' rights arising as part of the 2017-2019 TWG deliberations and recommendations?*

The response to this question takes the form of several opportunities that were not utilised (or indeed lost). First, the TWG itself could have undertaken to explore the proposals in the independent report further, leading to more comprehensive and detailed recommendations set out in a manner that emphasised their importance. Perhaps it did,

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<sup>60</sup> MMP has been used for voting at general elections since 1996. Essentially, under MMP, members of Parliament (MPs) are elected from around the country (through electorates) and from a political party list. Each voter has two votes (electorate and party votes). MMP is a proportional system, which means that the proportion of votes a political party gets largely reflects the number of seats it has in Parliament. A political party that wins at least one electorate seat, or 5 per cent of the party vote, gets a share of the seats in Parliament based on its party vote.

but there is a lack of publicly available evidence to conclude otherwise. Second, the New Zealand government could have taken a proactive stance to move New Zealand closer to the internationally perceived position of having a good balance of rights and obligations as between IR and taxpayers in the tax system. It could have sought to raise New Zealand to the standards set in other jurisdictions such as Australia and the US. Sadly, this was lost through a very limited reactive response. The absence of any real concern for taxpayers is highlighted through the failure to place any reform on the TPWP (as at the date of writing). A further lost opportunity, perhaps.

While this makes for depressing reading for a taxpayer, contextualisation would suggest that a taxpayer in New Zealand is in a much better place than taxpayers in a number of other jurisdictions, as illustrated by the IBFD's Observatory on the Protection of Taxpayers' Rights.<sup>61</sup> The general election originally intended to be held in September 2020 was rescheduled to October 2019 due to the Covid-19 crisis. With the Labour Party winning an outright majority this is an opportunity for it to include proposals to enhance taxpayers' rights as part of its agenda. The author, unfortunately, does not hold up much hope for this, given New Zealand tends to prefer to be reactive than to be proactive in this regard. If the environment becomes unsustainable, such as in the late 1990s within IR, then perhaps there may be some action from the New Zealand government. This, the author would suggest, is a suboptimal approach and does little to engender New Zealand as exhibiting the characteristics of a best practice jurisdiction.

This article is not without its limitations. The first is the inherent 'bias' of the author as a firm supporter of enhanced taxpayers' rights in New Zealand. While having worked formerly for IR, the author is aware of how revenue authorities see their role and directives, namely, to collect taxes imposed by the respective Parliament and to uphold the integrity of the tax system. When referring to taxpayers (who are not customers in the usual sense of the term), the author is primarily concerned with those taxpayers who lack the financial resources (and therefore are often unrepresented until they reach the disputes stage), and/or ability, to engage in an uneven playing field that is highly stacked against them (especially digitally challenged taxpayers). Larger businesses and multinational enterprises (MNEs) can work within this system, and indeed potentially exploit it to their advantage.

Furthermore, the author is only able to comment on publicly available information; not being an insider means there is no ability to reflect upon internal deliberations by the TWG, or within IR and the New Zealand government. One advantage of this is being free of the constraints that being in such a position would create, such as confidentiality restrictions and the inability to comment publicly.

This article has taken a case study of one significant event, namely the 2017-19 TWG review process. In that respect it cannot be generalised more widely but provides further evidence of an unwillingness to embrace any significant enhancement of formal taxpayers' rights in New Zealand by IR and the New Zealand government. Perhaps what is needed is much stronger lobbying on behalf of taxpayers (not including large businesses and MNEs), such as by professional bodies, to keep the issue in front of IR and the New Zealand government. Discussions through blogs and social media platforms could also assist. It may be in fact that the seriousness of the current

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<sup>61</sup> See <https://www.ibfd.org/Academic/Observatory-Protection-Taxpayers-Rights>. The author has contributed to the 2019 NZ report which was released in 2020: see n 26 above.



environment necessitates a wider revamp of the tax administration system (beyond that expected to be delivered by BT). Indeed there is a strong argument for a fundamental cultural change to occur within IR and tax administration more generally through which taxpayers' rights are enhanced. In this vein, Isaacs, writing in 2018, concludes:<sup>62</sup>

Perhaps it is time for a re-think of the entire Tax Administration Act's coherency and fit. Perhaps it is time for the development of a taxpayer charter of rights and responsibilities. It is certainly time for adjustments to ss 6 and 6A to ensure the Tax Administration Act makes dollars as well as sense.

Further discussion on this is beyond the scope of this article but could be the subject of future research.

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<sup>62</sup> Adele Isaacs, 'Making Dollars, Not Sense: The Tax Administration Act's Requirement for Impartial Partiality' (Dissertation submitted in partial fulfilment of the degree of Bachelor of Laws (Honours) at the University of Otago - Te Whare Wānanga o Otāgo, October 2018) 56.